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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

B. MIANECKI AND THE STATE OF WISCONSIN,
Petitioners,

v.

SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA,
THE HONORABLE JOHN E. GABRIELLI,
LINDA A. AVERETT AND STANLEY E. AVERETT, INDIVIDUALLY;
AND LINDA C. AVERETT, AS MOTHER AND GUARDIAN OF
TRENT AVERETT, A MINOR CHILD,
Respondents.

Petition For A Writ of Certiorari to The Supreme Court of The State of Nevada

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QUESTIONS PRESENTED

(1) Whether, under the Federal Constitution and the decision in *State of Nevada v. Hall,* 440 U.S. 410 (1979), the State of Wisconsin and its employees acting within the scope of their employment are immune from suit in the state courts of Nevada for official acts or omissions in the State of Wisconsin under the auspices of the Interstate Compact For The Supervision of Parolees And Probationers?

(2) Whether, in an action arising out of the Interstate Compact For The Supervision Of Parolees And Probationers, the Full Faith And Credit Clause requires the Nevada state courts to recognize the sovereign immunity of the State of Wisconsin?

LIST OF PARTIES

Petitioners herein and petitioners and defendants below are the State of Wisconsin and its employee Bernard Mianecki.* Respondents in the Supreme Court of the State of Nevada and defendants herein are the Second Judicial District Court of the State of Nevada in and for the County of Washoe and the Honorable John Gabrielli, District Judge. Also respondents herein are Stanley E. Averett and Linda A. Averett, individually and as guardian of Trent Averett, a minor, plaintiffs in the state trial court and real parties in interest before the Nevada Supreme Court.

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* Upon motion to the trial court, service of process on Earl Brunk, also an employee of the State of Wisconsin and a named defendant in the Nevada state court action, was quashed for lack of personal jurisdiction. Mr. Brunk is no longer a party to the action and is not involved in the present petition.

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OF THE STATE OF NEVADA,
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Petition For a Writ of Certiorari to The Supreme Court of The State of Nevada

OPINIONS BELOW

By Order entered June 23, 1982, the Honorable John E. Gabrielli, District Judge of the Second Judicial District Court of the State of Nevada in and for the County of Washoe, denied the motion to quash service of process upon the State of Wisconsin and its employee Bernard Mianecki. The Order is printed as Appendix A hereto. The Supreme Court of the State of Nevada subsequently denied the petition of Wisconsin and Mianecki for a writ of prohibition to the trial court against any further action in the matter. That decision is dated February 16, 1983, and is reported in the unofficial reports at 658 P.2d 422 (1983). That decision also appears as Appendix B hereto. The

decision will be reported in Volume 99 of the official Nevada reports at a page to be designated when the volume is printed.

JURISDICTION

The decision of the Nevada Supreme Court of which review by certiorari is sought herein was made and entered on February 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(c).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

Article IV, Section 1, of the United States Constitution reads in pertinent part: "Full Faith and Credit shall be given in each State as to the public Acts, Records, and judicial Proceedings of every other State."

Article I, Section 10, Clause 3, of the United States Constitution reads in pertinent part: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State. . . ."

The consent of Congress to the Interstate Compact For The Supervision Of Parolees And Probationers is given in Section 112(a) of Title 4 of the United States Code as follows:

> "The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts."

The State of Nevada adopted the Interstate Compact at Nevada Revised Statutes (NRS) § 213.180 *et seq.* The similar approval of the pact by the State of Wisconsin is codified at Wisconsin Statutes § 57.13. Copies of the Nevada and Wisconsin statutes are reproduced herein as Appendices C and D, respectively.

STATEMENT OF THE CASE

Barney Blake was convicted in the State of Wisconsin of sexual assault upon a male child and placed on probation under the Wisconsin Division of Corrections for a period of four years beginning February 12, 1981. He had previously become acquainted with Stanley and Linda Averett of Reno, Nevada. A short time after his probationary period began, Mr. Blake formally requested permission pursuant to the Interstate Compact For The Supervision Of Parolees And Probationers (the "Interstate Compact") to travel to Reno, Nevada and take up residence there with the Averetts.

Nevada and Wisconsin had both previously become signatories to the Interstate Compact. Through cooperation among the various participating states, the Compact seeks to improve the criminal justice system and to promote the rehabilitation of offenders and the protection of the public. Under proper circumstances and particularly in aid of rehabilitation, the Compact makes provision for a probationer or parolee to change his residence to another state, with the receiving state accepting responsibility for appropriate continuing supervision and control.

Mr. Bernard Mianecki was employed with the Wisconsin Department of Corrections as the person in charge of approving travel permits under the Interstate Compact. After being informed of the circumstances of the request and on the understanding and condition that Mr. Blake

would report to the Nevada authorities upon his arrival in Reno, Mr. Mianecki approved his travel permit.

Mr. Blake arrived in Reno on or about May 7, 1981, and began living with the Averetts. Shortly after May 7, he reported to the probation and parole department of the Reno Police Department. He subsequently registered with the Nevada authorities as a felon. Before the Nevada authorities were able to accept responsibility for Blake's supervision and control, he was arrested for acts of sexual assault upon the minor son of the Averetts. He pled guilty and was returned to Wisconsin where his probation was revoked. He has since been sentenced to a Wisconsin state prison where he remains.

In October of 1981, the Averetts, for themselves and their son, filed an action in the Nevada state court of general jurisdiction naming the State of Wisconsin and Bernard Mianecki as defendants. The complaint alleged negligence on the part of Mianecki as an employee of the State of Wisconsin in approving the travel permit of Mr. Blake under the Interstate Compact and in failing to advise the Averetts of his prior offense. The complaint alleged injury as a result of said negligence and sought the recovery of money damages.

The Wisconsin authorities are immune from a similar damages action in that state. Wisconsin and its employee Mianecki moved to quash service of process upon them in the Nevada action on the grounds that the Nevada court lacked jurisdiction over them under the doctrine of sovereign immunity, the Full Faith and Credit Clause of the Federal Constitution, and principles of comity. The motion was denied by the Nevada state trial court. Wisconsin and Mianecki sought the review of that denial by writ of prohibition to the Nevada Supreme Court. The Supreme Court denied the writ.

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

Petitioners raised and argued the issues relating to sovereign immunity as an incident of federalism and to the application of the Full Faith and Credit clause of the U.S. Constitution in their motion to the Nevada trial court to quash service of process upon them. In its Order of June 23, 1982, the trial court, citing this Court's decision in *State of Nevada v. Hall,* 440 U.S. 410 (1979), denied the motion. *See* Appendix A. The State of Wisconsin and Mianecki then filed their petition with the Nevada Supreme Court for a writ prohibiting the trial court from any exercise of jurisdiction in the matter over them as barred by the doctrine of the sovereign immunity of states in a federal system and the Full Faith and Credit Clause. The writ was denied, the Nevada Supreme Court also citing this Court's decision in *Nevada v. Hall, supra. See* Appendix B.

ARGUMENT

In *State of Nevada v. Hall,* 440 U.S. 410 (1979), this Court held that the State of Nevada was not constitutionally immune from suit in a California state court in a tort action arising out of an automobile collision occurring in California. The Court, however, expressly noted the limited nature of its decision as follows:

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occuring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a

different result. *Nevada v. Hall, supra*, 440 U.S. at 425, fn. 24.

The present case was thus anticipated by the Court. The issue of the exercise of judicial jurisdiction by one State over another and non-consenting State here, however, does not involve an ordinary claim of negligence such as that arising out of an automobile accident. The claim here involves actions taken under and pursuant to an agreement made between and among the states, acting in a sovereign capacity and with the consent of Congress, with respect to matters of crime and corrections, an area of primary and virtually exclusive sovereign responsibility.

The questions raised herein and anticipated by the *Hall* footnote, are, undeniably, important questions of federal law which should be settled and determined by this Court. Petitioners believe that the decision of the Nevada Supreme Court with respect to those questions is in conflict with this Court's decision in *Nevada v. Hall, supra*. Petitioners therefore respectfully submit that it would be a proper exercise of judicial discretion for this Court to grant the writ of certiorari sought herein.

1. Considerations of Cooperative Federalism Require The Finding That Wisconsin Is Immune From Suit In The Nevada State Courts In An Action Arising Out Of The Interstate Compact For The Supervision Of Parolees And Probationers.

In this case, a Nevada resident seeks to sue the State of Wisconsin in a Nevada state court on a claim arising out of actions taken by the State of Wisconsin in the exercise of its sovereign obligation to administer the criminal justice system. Those actions were taken under and pursuant to an interstate compact to which Nevada and Wisconsin became signatories in their respective sovereign capacities.

In becoming involved with the State of Nevada in this cooperative effort, Wisconsin certainly did not agree nor did it expect to become amenable to suit in the Nevada state courts.

. Notwithstanding the foregoing, however, the Nevada Supreme Court has held that this Court's decision in *Nevada v. Hall* permits a Nevada state court to exercise jurisdiction over the State of Wisconsin in an action arising out of actions taken pursuant to the Compact. *See,* Opinion, Appendix B. However, *Nevada v. Hall, supra,* expressly reserved ruling with respect to the existence of sovereign immunity in cases involving the capacity of a state to fulfill its own sovereign responsibilities. *See,* 40 U.S. at 425, fn. 24. As stated by this Court, such suits would threaten our "constitutional system of cooperative federalism." *Id.* Under that guideline, Nevada must recognize the sovereign immunity of the State of Wisconsin here.

The administration of the criminal justice system is the most primary of sovereign responsibilities. In this instance in meeting that sovereign responsibility, a number of states, including Nevada and Wisconsin, and with the express approval of Congress[1], have entered into an agreement for the interstate transfer of supervision and control of probationers and parolees.

The purpose of the Compact is to improve the protection of the public by facilitating the rehabilitation of the offender. Under the Compact, parolees or probationers with family connections or employment opportunities in a state other than that in which they were convicted can be

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[1] By requiring Congressional approval, the Constitution places such interstate agreements within the federal domain and makes their efficacy a matter of federal as well as local concern. *See, e.g., DeGenna v. Grasso,* 413 F.Supp. 427, 431 (D.Conn.1976).

transferred for their own benefit as well as that of the public. The Interstate Compact For The Supervision Of Parolees And Probationers thus represents the essence of cooperative federalism. The possibility of a parolee or probationer committing an additional crime or causing some injury or damage in the receiving state is unavoidable.

But, as set forth in the affidavits of the compact administrators of various states, if, as a result of the actions of transferred parolees or probationers, sending states were suddenly to become amenable to unlimited liability in suits brought in the state courts of receiving states, the purpose of the Compact would be seriously undermined. *See,* Appendices E through H. The exercise of jurisdiction by the receiving over the sending state under such circumstances would demonstrably interfere with the capacity of the sending state "to fulfill its sovereign responsibilities." At best, states would become reluctant to make use of transfer opportunities. At worst, they would simply withdraw from the Compact altogether.

It is respectfully submitted that the *Nevada v. Hall* decision does not and was not expressly intended to authorize the exercise of such jurisdiction under circumstances such as those involved here. In *Nevada v. Hall, supra,* this Court well described a "constitutional system of cooperative federalism." In such a system there is, and must be, as the *Nevada v. Hall* Court also realized, sovereign immunity for the actions of states taken, not as ordinary non-residents in the driving of automobiles, but in the exercise of true sovereign functions. That kind of sovereign immunity of states is involved in the present case. This Court should therefore grant the writ and reverse the Decision of the Nevada Court.

2. The State of Nevada Is Required To Give Full Faith and Credit To The Reservation Of Sovereign Immunity By The State Of Wisconsin.

The Full Faith And Credit Clause, Article IV, Section 1, of the United States Constitution has received substantial attention in the last several years. It has been recognized as "central to our system of jurisprudence." *Underwriters National Assurance Company v. North Carolina Life,* 455 U.S. 691, 703 (1982). It has also been described as "one of several provisions in the Federal Constitution designed to transform the several states from independent sovereignties into a single, unified nation." *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 322 (1981), *see also, Thomas v. Washington Gas Light Co.,* 558 U.S. 261 (1980); *Sherrer v. Sherrer,* 334 U.S. 343 (1948).

Because of the role of full faith and credit in a federal system, this Court has also acknowledged that it is improper to delegate to the states "its responsibility for the final arbitration of full faith and credit questions." *Thomas v. Washington Gas Light Co., supra,* 448 U.S. at 271. As this Court explained,

> "To vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other states that it was the purpose of the Full Faith and Credit Clause and other provisions of Art IV of the Constitution to prevent." (Cites omitted.) *Thomas v. Washington Gas Light Co., supra,* at p. 271.

It is precisely this kind of parochial interpretation of the Full Faith and Credit Clause that the Nevada Supreme Court has made here in overriding the State of Wisconsin's reservation of sovereign immunity.

Although it is established that the Full Faith and Credit Clause does not require a state to apply another state's law in violation of its own legitimate public policy *(see, e.g., Nevada v. Hall, supra,* 440 U.S. at 422), no such policy can be found here. Nevada itself has entered into the Interstate Compact, a clear endorsement of its purpose and underlying policies. Nevada as well has enacted only a limited waiver of its own sovereign immunity and has retained that immunity for discretionary actions such as a decision under the Compact to permit a probationer to transfer his residence to another state. *See,* NRS 41.032(2).

The only policy articulated by the Nevada Supreme Court, however, is the parochial one of providing Nevada residents with a remedy in Nevada courts. That policy interest, although legitimate, is not sufficient to justify infringing upon the likewise legitimate interest of Wisconsin in fulfilling its sovereign obligations with respect to the administration of its criminal justice system. It is impermissible, under *Nevada v. Hall, supra,* or the other full faith and credit decisions of this Court, to permit that kind of local parochial interest of Nevada to prevail over the interests of the State of Wisconsin in performing its sovereign capacity or over the federal interest in national unity "promoted by interstate compacts". *See, e.g., Allstate Ins. Co., supra,* 449 at 322-324 and fn. 10 (Stevens, concurring).

The Nevada Supreme Court erred in putting local interests over those of national proportion. This Court should grant the writ to rectify that error.

CONCLUSION

For the reasons set forth above, Petitioners Bernard Mianecki and the State of Wisconsin respectfully request the Court to grant the Writ and reverse the Decision of the Nevada Supreme Court.

Respectfully submitted,

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(APPENDICES FOLLOW)

Appendix A

Case No. 81-9446

Dept. No. 3

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE
STATE OF NEVADA
IN AND FOR
THE COUNTY OF WASHOE

Linda A. Averett and Stanley R. Averett, individually; and Linda C. Averett, as mother and natural guardian of Trent Averett, a minor child,

Plaintiffs,

vs.

B. Mianecki, E. A. Brunk and The State of Wisconsin; John Does I through X, inclusive,

Defendants.

[Filed June 23, 1982]

ORDER

Defendants' Motion to Quash Service, came on for oral argument on June 17, 1982. Steven Petersen, Esq., was present representing the Plaintiffs. William E. Peterson, Esq., was present representing the Defendants. Legal Points and Authorities were presented, the matter was argued, submitted, and taken under advisement.

The Court deeming itself fully advised in the premises finds and concludes as follows:

Barney Blake was convicted of a sex offense in the State of Wisconsin. While serving his probation, Blake requested

that he be allowed to live in Nevada. Pursuant to the Interstate Compact for Supervision of Persons Placed on Probation for the Commission of Criminal Acts, arrangements were made for Nevada supervision. Mr. Blake took up Nevada residence with Plaintiffs, Linda and Stanley Averett. Soon thereafter, he was involved in a sexual act with Trent Averett, Plaintiff's minor son. Mr. Blake's probation has been revoked. He is now serving the underlying sentence in Wisconsin.

Plaintiffs have filed suit asserting negligence of the State of Wisconsin in the transfer of Mr. Blake to Nevada. B. Mianecki and E. A. Brunk are also named Defendants as employees of the Wisconsin Department of Health and Social Services. Defendants have moved to quash service of process on the ground that this Court lacks personal jurisdiction.

Defendants argue that sovereign immunity precludes the courts of Nevada from exercising jurisdiction over the State of Wisconsin. The immunity of one state from the courts of another was circumscribed by the United States Supreme Court in *State of Nevada v. Hall*, 440 U.S. 410, 59 L.Ed. 2d 416, 99 S.Ct. 1182 (1979). The *Hall* court specifically denied the applicability of sovereign immunity to one state's exercise of jurisdiction over another. They held that "the enforcement of interstate comity must find its basis elsewhere in the constitution." *Id.* at 422.

Hall was an action against the State of Nevada in the California court system. A University of Nevada employee had been involved in a California traffic accident. Even though California had completely waived governmental immunity for such torts, the pertinent Nevada statute placed a $25,000 limit on any such recovery. Given the inapplicability of sovereign immunity, the court considered whether

the Full Faith and Credit Clause would require the California courts to recognize Nevada's limited waiver of tort immunity. They concluded that:

> "... to require California either to surrender jurisdiction or to limit respondents' recovery to the $25,000 maximum of the Nevada statute would be obnoxious to its statutory-based policies of jurisdiction over nonresident motorists and full recovery." *Id* at 425.

In the case at bar, the forum state, Nevada, has likewise waived its immunity to such an action. Immunity has been retained only for those actions which are deemed to be discretionary rather than operational. NRS 41.032(2). Wisconsin's decision to transfer Mr. Blake was clearly discretionary. However, having made that decision, they performed the operational task of effecting such a transfer. It is this operational act on which possible liability is based. Plaintiffs are not claiming that the act of transfer was itself actionable. Their suit is based on Wisconsin's failure to exercise due care in performance of the transfer. *See State v. Silva*, 86 Nev. 911, 478 P.2d 591 (1970).

Apparently, Wisconsin has failed to waive its immunity. Defendants maintain pursuant to the Hall case, that Nevada should grant full faith and credit to Wisconsin's reservation of such immunity.

The *Hall* court declined to consider whether the Full Faith and Credit Clause must necessarily be inapplicable to a sister state's reservation of immunity. However, they also failed to indicate what circumstance, if any, might justify the granting of such full faith and credit. "... we have no occasion in this case, to consider whether different state policies ... might require a different analysis or a different result." *State of Nevada v. Hall, supra,* at Footnote 24. Absent some indication that the *Hall* considerations are

inappropriate in this case, the Court is left to apply the same analysis.

The *Hall* court did not employ a simple balancing test as Defendants suggest. They were clear in their holding that "... the Full Faith and Credit Clause does not require a state to apply another state's law in violation of its own legitimate public policy." *Id.* at 423. The Court's aforementioned disclaimer in footnote 24 is merely a recognition that there may be a situation where a sister state's reservation of immunity could be so overwhelming as to overshadow another state's interest in providing a forum for litigation.

The Court does not consider this to be one of those situations. Nevada has a paramount interest in the protection of its citizenry from individuals who have been convicted of criminal offenses. Defendants advocate Wisconsin's interest in providing effective parole and probation services. However,

> "The prime purpose of both probation and parole is the protection of the community through the rehabilitation of those convicted of crime. The success of both procedures depends on adequate control of those who are released and intelligent supervision while under care." Council of State Government, *Handbook of Interstate Crime Control,* the Interstate Compact for the Supervision of Parolees and Probationers 1 (1978 ed.).

It is inconsistent to suggest that the purposes of the interstate compact would be furthered through frustration of Nevada's interest in protecting its citizens. Therefore, Defendants' Motion to Quash Service of process must be denied as to the State of Wisconsin.

Defendant B. Mianecki was instrumental in the transfer of Barney Blake to Nevada. From the facts at hand, the

Court finds sufficent basis for assertion of jurisdiction over Mianecki pursuant to the commission of a tortious act within this State. *See* NRS 14.065(2)(b). Defendant E. A. Brunk, on the other hand, had no involvement whatsoever with Mr. Blake's transfer. There is no basis for long-arm jurisdiction over Brunk. Defendants' Motion to Quash must also be denied as to B. Mianecki and granted as to E. A. Brunk.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' Motion to Quash Service, filed February 5, 1982, should be, and it hereby is, denied as to Defendants B. Mianecki and The State of Wisconsin, and

IT IS FURTHER ORDERED that the Motion to Quash Service, filed February 5, 1982, should be, and it hereby is, granted as to E. A. Brunk.

DATED: This 23rd day of June, 1982.

/s/ JOHN GABRIELLI

District Judge

Appendix B

IN THE SUPREME COURT
OF THE
STATE OF NEVADA

No. 14180

B. Mianecki, and The State of Wisconsin,

Petitioners,

vs.

Second Judicial District Court of the State of Nevada,
in and for the County of Washoe,
and The Honorable John E. Gabrielli,

Respondents,

Linda A. Averett and Stanley E. Averett, individually;
and Linda C. Averett, as mother and guardian of
Trent Averett, a minor child,

Real Parties In Interest.

Original petition for a writ of prohibition.

Writ denied.

Woodburn, Wedge, Blakey and Jeppson, and
William E. Peterson, Reno,

for Petitioners,

Petersen & Petersen, Reno,

for Respondents.

[Filed February 16, 1983]

OPINION

By the Court, Steffen, J.:

Petitioners, by this original proceeding in prohibition, ask us to overturn the district court's order denying peti-

tioners' motion to quash service of summons and complaint filed by the Averetts, the real parties in interest. We have considered each of petitioners' contentions and have concluded that the district court did not err in denying petitioners' motion.

The factual scenario giving rise to the Averetts' complaint has interstate implications of substantial magnitude. According to the allegations of the complaint, a convicted sex offender, Barney Blake, was placed on probation for the first degree sexual assault of a young boy in Wisconsin. Blake was to be under the supervision of the Wisconsin Division of Corrections during his four year period of probation. At some point during that period, Blake sought and received approval from the Division of Corrections to permanently relocate in Nevada. Shortly after his arrival in this state, Blake moved in with the Averetts, who were uninformed of his history of sexual aberrations and criminal conduct. Eventually, Blake victimized the minor son of the Averetts.

The complaint alleged that petitioners violated certain provisions of the Interstate Compact for the Supervision of Parolees and Probationers[1] and, in addition, set forth two causes of action in negligence: (1) failure to warn the Averetts of Blake's sexual propensities; and (2) failure to supervise properly and control Blake's activities.

Petitioners, the State of Wisconsin and B. Mianecki,[2] seek avoidance of Nevada jurisdiction under the doctrines of sovereign immunity, full faith and credit, and comity. There are compelling reasons why we cannot accept the

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[1] NRS 213.180 *et seq.*

[2] B. Mianecki is employed by the State of Wisconsin as a "compact specialist." He is also the individual who actually approved Blake's travel permit.

propositions asserted by Mianecki and our sister state, Wisconsin.

All parties agree that the landmark decision of Nevada v. Hall, 400 U.S. 410 (1978), is dispositive of the sovereign immunity issue. Each, however, interprets *Hall* in a different light consistent with its respective position. The *Hall* case arose in California, where an employee of the University of Nevada, traveling by automobile on official business, negligently injured several California residents. Action was instituted in California against the State of Nevada and its employee. Nevada moved unsuccessfully to quash service and dismiss the action on grounds of sovereign immunity. The California Supreme Court held that the State of Nevada enjoyed no immunity in the courts of California. Hall v. Nevada, 503 P.2d 1363 (Cal. 1973), *aff'd,* Nevada v. Hall, *supra.* The United States Supreme Court affirmed the California court, holding that the sovereign immunity doctrine, which, absent consent, precludes actions against a state in its own courts, provides no such immunity in the courts of another state.

Other jurisdictions which have applied *Nevada v. Hall* have reached the same result. *See, e.g.,* Peterson v. State of Tex., 635 P.2d 241 (Colo. App. 1981); Daughtry v. Arlington County, Va., 490 F.Supp. 307 (D.C. Dist. 1980); and Wendt v. County of Osceola, Iowa, 289 N.W.2d 67, (Minn. 1979). The *Peterson* case is analogous to the instant action. There, the plaintiff, a Colorado resident, brought an action in Colorado against the State of Texas and its agent. The complaint alleged that the plaintiff's automobile was stolen and damaged by two juveniles who were in Colorado on a juvenile rehabilitation program sponsored by the Texas Youth Council. It was further alleged that the person in charge of the program in Colorado, as an agent of the State of Texas, and the Texas Youth Council were negligent in

the supervision of the two juveniles. The State of Texas challenged jurisdiction of the Colorado court arguing that *Nevada v. Hall* should be limited to factual situations involving automobile collisions. The Colorado court in *Peterson* disagreed and held as follows:

> We approve the reasoning of the California court and hold that where the injured party is a citizen of this state, injured in this state and sues in the courts of this state, there is no immunity, by law or as a matter of comity, covering a sister state activities in this state. Hall v. Nevada, *supra;* Nevada v. Hall, *supra.*

635 P.2d at 243.

Based on the above authority, we conclude that petitioners are not immune from suit in this jurisdiction.

Since Wisconsin has not seen fit to waive its immunity, the question remains as to whether this state should grant full faith and credit to Wisconsin's reservation of such immunity. According to *Nevada v. Hall,* questions of interstate suability must be determined under the law of the forum. Furthermore, "[t]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public purpose." 440 U.S. at 442. Therefore, we must ascertain Nevada's policies and determine whether this state would permit itself to be sued if it had engaged in the conduct assigned to Wisconsin in the present action.

The State of Nevada has waived its sovereign immunity by the enactment of NRS 41.031.[3] However, immunity has been retained with respect to claims arising out of conduct

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[3] NRS 41.031 provides: "The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons. . . ."

which is deemed to be discretionary rather than operational. NRS 41.032(2).[4] *See also* Andolino v. State, 97 Nev. 53, 624 P.2d 7 (1981). In the instant case, the adoption of the Interstate Compact for Supervision of Parolees and Probationers by Nevada and Wisconsin constituted, in each instance, a discretionary act for which each state would maintain immunity because the act of adopting rules and regulations is a discretionary function. Upchurch v. State, 454 P.2d 112 (Hawaii 1969). However, the Averetts do not attribute their injuries to the discretionary act of adopting the compact or the decision to transfer Blake to Nevada. The gravamen of their claim against petitioners is based upon the negligent performance of operational acts by the Wisconsin Division of Correction in effectuating the transfer and placement of Blake in Nevada. The allegations of failure to investigate where Blake would be living and to warn the Averetts of the nature of Blake's prior offense refer to operational deficiencies for which immunity has been waived. *See* Silva v. State, 86 Nev. 911, 478, P.2d 591 (1970); *see also* Johnson v. State, 447 P.2d 352 (Cal. 1968). We thus conclude that if the acts complained of had been committed by the Nevada Department of Parole and Probation, sovereign immunity would not bar suit against Nevada. NRS 41.032(2). Therefore, under Nevada v. Hall, *supra,* Nevada as the forum state is not required to honor Wisconsin's claim of sovereign immunity, especially in light of the fact that Nevada has a paramount interest in protecting its citizens from individuals who have been convicted of criminal offenses. Furthermore, we reject petitioners' argument that the purpose and policies of the compact would be frustrated if Nevada is permitted to assert jurisdiction. On the contrary, assertion of jurisdiction

[4] NRS 41.032(2) provides: "No action may be brought . . . which is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty. . . ."

should encourage compliance with the compact and promote its policies inasmuch as "[t]he prime purpose of both probation and parole is the protection of the community through the rehabilitation of those convicted of crime [and] the success of both procedures depends on adequate control of those who are released and intelligent supervision while under care." Council of State Government, *Handbook of Interstate Crime Control,* the Interstate Compact for Supervision of Parolees and Probations, page 1 (1978 ed.). Accordingly, we hold that petitioners are not immune from suit in Nevada.

The final issue for our consideration is whether Nevada should decline to exercise jurisdiction as a matter of comity. In general, comity is a principle whereby the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect. Brown v. Babbitt Ford, Inc., 571 P.2d 689, 695 (Ariz. 1977). The principle is appropriately invoked according to the sound discretion of the court acting without obligation. *Id.; see also* City of Philadelphia v. Austin, 429 A.2d 568 (N.J. 1981). "[I]n considering comity, there should be due regard by the court to the duties, obligations, rights and convenience of its own citizens and of persons who are within the protection of its jurisdiction." State *ex rel.* Speer v. Haynes, 392 So.2d 1183, 1185 (Ala. Civ. App. 1979), *rev'd on other grounds,* 392 So.2d 1187. With this in mind, we believe greater weight is to be accorded Nevada's interest in protecting its citizens from injurious operational acts committed within its borders by employees of sister states, than Wisconsin's policy favoring governmental immunity. Therefore, we hold that the law of Wisconsin should not be granted comity where to do so would be contrary to the policies of this state.

Accordingly, the writ of prohibition is denied.

/s/ J. STEFFEN
Steffen

We concur:

/s/ C. J. MANOUKIAN
Manoukian

/s/ J. SPRINGER
Springer

/s/ J. MOWBRAY
Mowbray

/s/ Sr. J.[5] ZENOFF
Zenoff

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[5] The Chief Justice assigned Senior Justice David Zenoff to participate in the decision of this matter, in the place and stead of E. M. Gunderson, Justice, pursuant to the Nevada Constitution, Art. 6, § 19(1)(a) and 19(1)(c), and SCR 10.

Appendix C

NEVADA REVISED STATUTES
OUT-OF-STATE PAROLEE SUPERVISION

213.180 Short title. NRS 213.180 to 213.210, inclusive, may be cited as the Uniform Act for Out-of-State Parolee Supervision.

[1:111:1949; 1943 NCL § 11591.01]

213.185 "State" defined; Nevada a party to compact with additional jurisdictions joining therein.

1. It is hereby declared that the term "state" as used in NRS 213.180 to 213.210, inclusive, means any one of the several states and the Commonwealth of Puerto Rico, the Virgin Islands and the District of Columbia.

2. It is hereby recognized and further declared that pursuant to the consent and authorization contained in 4 U.S.C. § 112 this state shall be a party to the Interstate Compact for the Supervision of Parolees and Probationers with any additional jurisdiction legally joining therein when such jurisdiction shall have enacted the compact in accordance with the terms thereof.

(Added to NRS by 1957, 241; A 1967, 213; 1969, 7)

213.190 Governor authorized to enter into compacts with states regarding parole and probation supervision. Pursuant to the authority vested in this state by that certain act of Congress, approved June 6, 1934, and entitled "An act granting the consent of Congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime, and for other purposes," the governor is hereby authorized and directed to enter into a compact or compacts on behalf of this state with any of the United States legally joining therein.

[2:111:1949; 1943 NCL § 11591.02]

213.200 Form of compact. The compact or compacts shall be in substantially the following form:

A compact entered into by and among the contracting states, signatories hereto, with the consent of the Congress of the United States of America, granted by an act entitled "An act granting the consent of Congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes."

The contracting states solemnly agree:

1. That it shall be competent for the duly constituted judicial and administrative authorities of a state, party to this compact (herein called "sending state"), to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state, party to this compact (herein called "receiving state"), while on probation or parole, if:

(a) Such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there.

(b) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than 1 year prior to his coming to the sending state and has not resided within the sending state more than 6 continuous months immediately preceding the commission of the offense for which he has been convicted.

2. That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state, and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

3. That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state. If at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

4. That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference.

5. That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

6. That this compact shall become operative immediately upon its ratification by any state as between it and any other state or states so ratifying. When ratified it shall

have the full force and effect of law within such state, the form of ratification to be in accordance with the laws of the ratifying state.

7. That this compact shall continue in force and remain binding upon each ratifying state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which ratified it, by sending 6 months' notice in writing of its intention to withdraw from the compact to the other states party hereto.

[3:111:1949; 1943 NCL § 11591.03]

213.210 NRS 213.180 to 213.210, inclusive, construed as distinct from law relating to extradition of fugitives from justice. NRS 213.180 to 213.210, inclusive, and compacts made pursuant thereto shall be construed as separate and distinct from any act or acts of this state relating to the extradition of fugitives from justice.

[5:111:1949; 1943 NCL § 11591.05]

Appendix D

WEST'S WISCONSIN STATUTES ANNOTATED

Out-of-state parolee supervision; state compacts

The governor of this state is authorized and directed to enter into a compact on behalf of this state with any state of the United States legally joining therein in the form substantially as follows:

A COMPACT

Entered into by and among the contracting states, signatories hereto, with the consent of the congress of the United States of America, granted by an act entitled "An act granting the consent of congress to any two or more states to enter into agreements or compacts for co-operative effort and mutual assistance in the prevention of crime and for other purposes".

The contracting states solemnly agree:

(1) That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this contract (herein called "sending state") to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact (herein called "receiving state") while on probation or parole, if

(a) Such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there; or

(b) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

(c) Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

(d) A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than 6 continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That the duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state; provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all such states parties to this compact, without interference.

(5) That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its ratification by any state as between it and any other state or states so ratifying. When ratified it shall have the full force and effect of law within such state, the form of ratification to be in accordance with the laws of the ratifying state.

(7) That this compact shall continue in force and remain binding upon such ratifying state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal or until finally discharged by the sending state. Renunciation of this compact shall be by the same authority which ratified it, by sending 6 months' notice in writing of its intention to withdraw the compact to the other states party thereto.

(9) This section may be cited as the "Uniform Act for Out-of-State Parolee Supervision".

Appendix E

IN THE SUPREME COURT
OF THE
STATE OF NEVADA

No. 14180

B. Mianecki, and The State of Wisconsin,

Petitioners,

vs.

Second Judicial District Court of the State of Nevada,
in and For The County of Washoe,
and The Honorable John E. Gabrielli,

Respondents.

Linda A. Averett and Stanley E. Averett,
individually; and Linda A. Averett,
as mother and guardian of
Trent Averett, a minor child,

Real Parties In Interest.

AFFIDAVIT

STATE OF WISCONSIN
COUNTY OF DANE } ss:

I, Pamela J. Brandon, after being duly sworn, do depose and say as follows:

1. I am the Administrator for the Interstate Compact for the supervision of persons placed on probation for the commission of criminal acts.

2. I have read the complaint captioned Averett vs. Mianecki, et al., case number 81-9446 set in the District Court for the State of Nevada and I have read the Motion To Quash said complaint filed by the State of Wisconsin.

3. I make this affidavit in support of the Petition For Prohibition filed by the State of Wisconsin to prevent the courts of the State of Nevada from exercising jurisdiction over the State of Wisconsin for damages for alleged acts and/or omissions arising out of transactions pertaining to the Interstate Compact.

4. The principal purposes of the Compact are to preserve and improve our criminal justice system and to further implement its underlying purposes of protection of the public and rehabilitation of the client. This is accomplished by encouraging and promoting cooperation among the various states pursuant to the Compact.

5. The possibility of a parolee or probationer who is issued a travel permit under the provisions of the Interstate Compact perpetrating a criminal act and causing injury or damage to persons cannot always be predicted. There is always the possibility that a parolee or probationer who is issued a travel permit under the provisions of the Compact may commit a criminal act.

6. In my opinion, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, the purposes of the Compact as hereinbefore mentioned, would be seriously impaired and undermined.

7. In my opinion, which is based on my familiarity with the Compact and which is also based upon familiarity with Compact administrators and Compact administration in other states, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, some states would give serious consideration to withdrawing from the Compact, and some states would, in fact, withdraw from the Compact.

8. In my opinion, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, the various states would give more concern to their own potential liability than to the underlying purposes and goals of the Compact itself.

9. In my opinion, if the various states were held to answer in courts of other states for activities undertaken pursuant to the Compact, it would seriously impair and impede the mutual cooperation which the Compact was designed to secure.

10. In my opinion, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, and if they were not given the protection of the laws of their own jurisdiction, including the limitations of liability and sovereign immunity, then I believe the states would give serious consideration to withdrawing from the Compact and I believe that some states would withdraw from the Compact.

11. In my opinion, if the various states were held to answer in other states for activities undertaken pursuant to the Compact, and if the various states were not given the protection of the laws of their own jurisdiction, including the limitations of liability and sovereign immunity, then I believe that the Compact itself would eventually be destroyed.

12. In my opinion, if the various states were held to answer in other states for activities undertaken pursuant to the Compact, then I believe that the State of Wisconsin would give serious consideration to withdrawing from the Compact in order to protect itself from potential liability and as Compact Administrator I would recommend that Wisconsin withdraw from the Compact.

DATED this *25th* day of October, 1982.

/s/ PAMELI J. BRANDON
Pamela J. Brandon

SUBSCRIBED and SWORN to before me
this *25th* day of October, 1982.

/s/ KATHIE GHERKE
Notary Public

Kathie Gherke

My Commission expires: November 24, 1985

Appendix F

IN THE SUPREME COURT
OF THE
STATE OF NEVADA

No. 14180

B. Mianecki, and The State of Wisconsin,

Petitioners,

vs.

Second Judicial District Court of the State of Nevada,
in and for the County of Washoe,
and The Honorable John E. Gabrielli,

Respondents.

Linda A. Averett and Stanley E. Averett, individually;
and Linda A. Averett, as mother and guardian of
Trent Averett, a minor child,

Real Parties In Interest.

AFFIDAVIT

STATE OF MISSOURI }
COUNTY OF COLE } ss:

I, Patricia Parker, after being duly sworn, do depose and say as follows:

1. I am the President of the Interstate Compact for the supervision of persons placed on probation for the commission of criminal acts.

2. I am also Deputy Compact Administrator for the State of Missouri.

3. I have read the complaint captioned Averett vs. Mianecki, et al., case number 81-9446 and the Motion to Quash filed by the State of Wisconsin and am familiar with the contents therein.

4. I make this affidavit in support of the Petition For Prohibition filed by the State of Wisconsin to prevent the courts of the State of Nevada from exercising jurisdiction over the State of Wisconsin for damages for alleged acts and/or omissions arising out of transactions pertaining to the Interstate Compact.

5. As President of the Compact I am intimately familiar with the purposes, policies and provisions of the Interstate Compact.

6. The principal purposes of the Compact are to preserve and improve our criminal justice system and to further implement its underlying purposes of protection of the public and rehabilitation of the client. This is accomplished by encouraging and promoting cooperation among the various states pursuant to the Compact.

7. The possibility of a parolee or probationer who is issued a travel permit under the provisions of the Interstate Compact perpetrating a criminal act and causing injury or damage to persons cannot always be predicted. There is always the possibility that a parolee or probationer who is issued a travel permit under the provisions of the Compact may commit a criminal act.

8. In my opinion, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, the purposes of the Compact as hereinbefore mentioned, would be seriously impaired and undermined.

9. In my opinion, which is based on my familiarity with the Compact and which is also based upon my familiarity with Compact administrators and Compact administration in other states, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, some states would give serious considera-

tion to withdrawing from the Compact, as has the State of Indiana, and some states would, in fact, withdraw from the Compact.

10. In my opinion, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, the various states would give more concern to their own potential liability than to the underlying purposes and goals of the Compact itself.

11. In my opinion, if the various states were held to answer in courts of other states for activities undertaken pursuant to the Compact, it would seriously impair and impede the mutual cooperation which the Compact was designed to secure.

12. In my opinion, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, and if they were not given the protection of the laws of their own jurisdiction, including the limitations of liability and sovereign immunity, then I believe the states would give serious consideration to withdrawing from the Compact and I believe that some states would withdraw from the Compact.

13. In my opinion, if the various states were held to answer in other states for activities undertaken pursuant to the Compact, and if the various states were not given the protection of the laws of their own jurisdiction, including the limitations of liability and sovereign immunity, then I believe that the Compact itself would eventually be destroyed.

Dated this *12th* day of November, 1982.

/s/ PATRICIA A. PARKER

Patricia Parker

SUBSCRIBED and SWORN to before me
this *12th* day of November, 1982.

/s/ VIRGINIA COFFMAN

Notary Public

My Commission expires: March 8, 1986

Appendix G

IN THE SUPREME COURT
OF THE
STATE OF NEVADA

No. 14180

B. Mianecki, and The State of Wisconsin,

Petitioners,

vs.

Second Judicial District Court of The State of Nevada,
in and for The County of Washoe,
and The Honorable John E. Gabrielli,

Respondents.

Linda A. Averett and Stanley E. Averett, individually;
and Linda A. Averett, as mother and guardian of
Trent Averett, a minor child,

Real Parties In Interest.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE } ss:

I, Victor Townsley, after being duly sworn, do depose and say as follows:

1. I am the head of the Executive Council for the Interstate Compact for the supervision of persons placed on probation for the commission of criminal acts.

2. I am also the Deputy Compact Administrator for the State of Louisiana.

3. I have read the complaint captioned Averett vs. Mianecki, et al., case number 81-9446 set in the District

Court for the State of Nevada and I have read the Motion To Quash said complaint filed by the State of Wisconsin.

4. I make this affidavit in support of the Petition For Prohibition filed by the State of Wisconsin to prevent the courts of the State of Nevada from exercising jurisdiction over the State of Wisconsin for damages for alleged acts and/or omissions arising out of the transactions pertaining to the Interstate Compact.

5. The principal purposes of the Compact are to preserve and improve our criminal justice system and to further implement its underlying purposes of protection of the public and rehabilitation of the client. This is accomplished by encouraging and promoting cooperation among the various states pursuant to the Compact.

6. The possibility of a parolee or probationer who is issued a travel permit under the provisions of the Interstate Compact perpetrating a criminal act and causing injury or damage to persons cannot always be predicted. There is always the possibility that a parolee or probationer who is issued a travel permit under the provisions of the Compact may commit a criminal act.

7. In my opinion, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, the purposes of the Compact as hereinbefore mentioned, would be seriously impaired and undermined.

8. In my opinion, which is based on my familiarity with the Compact and which is also based upon my familiarity with Compact administrators and Compact administration in other states, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, some states would give serious con-

sideration to withdrawing from the Compact, and some states would, in fact, withdraw from the Compact.

9. In my opinion, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, the various states would give more concern to their own potential liability than to the underlying purposes and goals of the Compact itself.

10. In my opinion, if the various states were held to answer in courts of other states for activities undertaken pursuant to the Compact, it would seriously impair and impede the mutual cooperation which the Compact was designed to secure.

11. In my opinion, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, and if they were not given the protection of the laws of their own jurisdiction, including the limitations of liability and sovereign immunity, then I believe the states would give serious consideration to withdrawing from the Compact and I believe that some states would withdraw from the Compact.

12. In my opinion, if the various states were held to answer in other states for activities undertaken pursuant to the Compact, and if the various states were not given the protection of the laws of their own jurisdiction, including the limitations of liability and sovereign immunity, then I believe that the Compact itself would eventually be destroyed.

13. In my opinion, if the various states were held to answer in other states for activities undertaken pursuant to the Compact, then I believe that the State of Louisiana would give serious consideration to withdrawing from the Compact in order to protect itself from potential liability and as head of Executive Council and Deputy Compact

Administrator I would recommend that Louisiana withdraw from the Compact.

DATED this *25th* day of October, 1982.

/s/ VICTOR E. TOWNSLEY

Victor Townsley

SUBSCRIBED and SWORN to before me
this *25th* day of October, 1982.

/s/

Notary Public

Appendix H

IN THE SUPREME COURT
OF THE
STATE OF NEVADA

No. 14180

B. Mianecki, and The State of Wisconsin,

Petitioners,

vs.

Second Judicial District Court of the State of Nevada,
in and for The County of Washoe,
and The Honorable John E. Gabrielli,

Respondents.

Linda A. Averett and Stanley E. Averett, individually;
and Linda A. Averett, as mother and guardian of
Trent Averett, a minor child,

Real Parties In Interest.

AFFIDAVIT

STATE OF OHIO
COUNTY OF FRANKLIN } ss:

I, John W. Shoemaker, after being duly sworn, do depose and say as follows:

1. I am the Administrator for the Interstate Compact as to parolees and probationers for the State of Ohio.

2. As Compact Administrator, I am intimately familiar with the purposes, policies and provisions of the Interstate Compact.

3. I have been advised of the complaint captioned Averett vs. Mianecki, et al., case number 81-9446 set in the District Court for the State of Nevada but I have not had

an opportunity to read the Motion To Quash said complaint filed by the State of Wisconsin.

4. I make this affidavit in support of the Petition For Prohibition filed by the State of Wisconsin to prevent the courts of the State of Nevada from exercising jurisdiction over the State of Wisconsin for damages for alleged acts and/or omissions arising out of transactions pertaining to the Interstate Compact.

5. The principal purposes of the Compact are to preserve and improve our criminal justice system and to further implement its underlying purposes of protection of the public and rehabilitation of the client. This is accomplished by encouraging and promoting cooperation among the various states pursuant to the Compact.

6. The possibility of a parolee or probationer who is issued a travel permit under the provisions of the Interstate Compact perpetrating a criminal act and causing injury or damage to persons cannot be predicted. There is always the possibility that a parolee or probationer who is issued a travel permit under the provisions of the Compact may commit a criminal act.

7. In my opinion, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, the purposes of the Compact as hereinbefore mentioned, would be seriously impaired and undermined.

8. In my opinion, which is based on my familiarity with the Compact and which is also based upon my familiarity with Compact administrators and Compact administration in other states, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, some states would give serious

consideration to withdrawing from the Compact, and might, in fact, withdraw from the Compact.

9. In my opinion, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, the various states would give more concern to their own potential liability than to the underlying purposes and goals of the Compact itself.

10. In my opinion, if the various states were held to answer in courts of other states for activities undertaken pursuant to the Compact, it would seriously impair and impede the mutual cooperation which the Compact was designed to secure.

11. In my opinion, if the various states were held to answer in the courts of other states for activities undertaken pursuant to the Compact, and if they were not given the protection of the laws of their own jurisdiction, including the limitations of liability and sovereign immunity, then I believe the states would give serious consideration to withdrawing from the Compact and I believe that some states might withdraw from the Compact.

12. In my opinion, if the various states were held to answer in other states for activities undertaken pursuant to the Compact, and if the various states were not given the protection of the laws of their own jurisdiction, including the limitations of liability and sovereign immunity, then I believe that the Compact itself would eventually be destroyed.

13. In my opinion, if the various states were held to answer in other states for activities undertaken pursuant to the Compact, then I believe that the State of Ohio would

give serious consideration to withdrawing from the Compact in order to protect itself from potential liability.

DATED this *26th* day of October, 1982.

/s/ JOHN W. SHOEMAKER

John W. Shoemaker

SUBSCRIBED and SWORN to before me
this *26th* day of October, 1982.

/s/

Notary Public

[SEAL]

82-1870

FILED

JUN 20 1983

ALEXANDER L. STEVAS, CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

B. MIANECKI and THE STATE OF WISCONSIN,
Petitioners,

vs.

SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
THE HONORABLE JOHN E. GABRIELLI,
LINDA A. AVERETT and STANLEY E. AVERETT, individually;
and LINDA A. AVERETT, as mother and guardian of
TRENT AVERETT, a minor child,
Respondents.

ANSWERING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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Townsend v. Wisconsin Desert Horse Assoc. et al., 72 Wis.2d 414, 167 N.W.2d 425 (1969)	12

Constitution

United States Constitution, Art. IV, Sec. 1	8

Statutes and Rules

United States Supreme Court Rules, Rule 17	4

Secondary Authorities

The Council of State Governments, Handbook For Interstate Crime Control, The Interstate Compact for the Supervision of Parolees and Probationers	10

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

B. MIANECKI and THE STATE OF WISCONSIN,
Petitioners,

vs.

SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
THE HONORABLE JOHN E. GABRIELLI,
LINDA A. AVERETT and STANLEY E. AVERETT, individually;
and LINDA A. AVERETT, as mother and guardian of
TRENT AVERETT, a minor child,
Respondents.

ANSWERING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

NOTE TO LIST OF PARTIES

The List of Parties on page ii of the Petition for a Writ of Certiorari correctly identifies the guardian of the minor child. Trent Averett, as "Linda A. Averett", but the caption of the case incorrectly identifies her as "Linda C. Averett". The Respondents, Second Judicial District Court of the State of Nevada and The Honorable John E.

Gabrielli are nominal parties, the real parties in interest being the Averetts. Counsel herein is counsel for the Respondent Averetts, but files this Answering Brief on behalf of all Respondents.

ARGUMENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Petitioners, The State of Wisconsin and B. Mianecki, an employee of Wisconsin charged with responsibility for the administration of the Interstate Compact for the Supervision of Parolees and Probationers for Wisconsin, have petitioned for a writ of certiorari to review the decision of the Nevada Supreme Court, set forth in Appendix B to the Petition, wherein the Nevada Supreme Court ruled that the courts of the State of Nevada were constitutionally entitled to provide a forum to the citizens of Nevada to recover damages for injuries suffered as a result of negligence of Wisconsin in the administration of the Interstate Compact for the Supervision of Parolees and Probationers.

This case involves an application of the prior decision of this Court in *State of Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979) to a cause of action for negligence arising from the performance of duties and responsibilities undertaken pursuant to the Interstate Compact entered into by the states in their sovereign capacities and approved by Congress. The Petitioners contend that a decision by this Court on the scope of *State of Nevada v. Hall, supra*, is required because, unlike the automobile accident situation in *Hall*, this case involves the exercise of sovereign functions, which invokes considerations of "cooperative federalism" and the "Full Faith and Credit Cause" of the United States Constitution.

A. Considerations of "Cooperative Federalism" Do Not Justify a Restrictive Construction of State of Nevada v. Hall in the Context of the Case at Bar

The Petitioners' first contention in support of their Petition is premised upon the language of footnote 24 to this Court's opinion in *State of Nevada v. Hall*, 440 U.S. 410, 425, 99 S.Ct. 1182, 1191, 59 L.Ed.2d 416 (1979) wherein it is stated:

> "California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result."

Relying upon the above language in *State of Nevada v. Hall, supra*, the Petitioners contend that, inasmuch as this case involves action taken under and pursuant to an agreement made between two sovereign states, acting in their sovereign capacity, with regard to crime and corrections—a field uniquely of sovereign responsibility—the decision of the Nevada Supreme Court expressly contravenes the holding of *State of Nevada v. Hall, supra.* Petitioners contend that such decision should be overruled by this Court in order to preserve intact the spirit of "cooperative federalism" manifested by the sovereign states who are parties to the Interstate Compact.

To buttress this argument, Petitioners have attempted to introduce original evidence, not a part of the Record in the Nevada Supreme Court, by inclusion of four self-serving "opinion" affidavits as Appendices E, F, G and

H to their Petition. Petitioners' efforts to make these same affidavits a part of the Record in the Nevada Supreme Court was specifically and expressly rejected by the Nevada Supreme Court, by Order filed and entered November 9, 1982 (Appendix A to this Answering Brief), and then again when Petitioners tried to refile them in the guise of amicus curiae briefs. (Order, December 8, 1982, Appendix B to this Answering Brief). Review by certiorari is an exercise of appellate jurisdiction, and does not contemplate the introduction of original evidence not considered by the Court whose decision is under review. It is therefore respectfully submitted that such self-serving affidavits cannot properly be considered in support of the Petition.

It is respectfully submitted that the contentions of the Petitioners in support of their Petition for a Writ of Certiorari do not justify the intervention of this Court under the considerations governing the issuance of a Writ of Certiorari as set forth in Rule 17 of the United States Supreme Court Rules. The fundamental issue raised by the Petition is whether one sovereign state is constitutionally bound to recognize the reserved sovereign immunity of a sister state by denying access to its courts to its citizens who have suffered damages as a result of torts committed within such state by the sister state. That issue was resolved by this Court in *State of Nevada v. Hall, supra.* The state courts which have had occasion to interpret and apply the *Hall* decision have shown remarkable uniformity in their application of its principles, and have manifested no compelling need for further guidance from the United States Supreme Court at this time. Such state court decisions have uniformly recognized that the forum state is not constitutionally bound to recognize the reserved

sovereign immunity of a sister state when to do so would violate its own fundamental policies, whether the liabilities of the sister state are predicated upon tort or upon contracts entered into and performed as a sovereign, and whether or not the breach of duty arose from the performance of a governmental or sovereign function. The dire predictions of the collapse of the federal system which were made in each of such cases have not become a reality as the result of the willingness of the Courts to hold a sovereign accountable for its wrongdoing in a sister state.

In *Daughtry v. Arlington County, Virginia*, 490 F.Supp. 307 (D.D.C. 1980), the District of Columbia Court recognized that the exercise of sovereign functions in the area of crime and corrections did not compel recognition of the reserved sovereign immunity of Virginia. In so holding, the Court stated: [at 490 F.Supp. p. 315]

> "The Full Faith and Credit Clause of the Constitution does not require courts in the District of Columbia to recognize the sovereign immunity of Virginia. See *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed. 2d 416 (1979). The defendant's contention that the *Nevada* case is distinguishable from this suit because a judgment against Arlington County, Virginia, will interfere with the ability of the sovereign to fulfill its responsibilities is without merit. While the County is free to exercise its police power, it must compensate the victims of its wrongful conduct."

Similarly, in *Peterson v. Texas*, 635 P.2d 241 (Colo. Ct. App. 1981), the Colorado Court, in a case analogous to that at bar, involving supervision and control of persons involved in the corrections system, specifically a juvenile rehabilitation program administered by the State of Texas, recognized that Colorado citizens injured as a result of

negligent supervision of the juvenile offenders had a remedy in the Colorado courts, which were not bound to recognize the reserved sovereign immunity of Texas.

In a case specifically involving duties of a sovereign arising from an interstate contract entered into by the States of Iowa and Illinois in their sovereign capacities, the Iowa Court rejected the very same arguments made by the Petitioners herein. In *Struebin v. State,* 322 N.W.2d 84 (Iowa 1982), the State of Illinois was bound by contract with the State of Iowa to maintain the Interstate 80 bridge over the Mississippi River on the border of the two states. As a result of negligent maintenance, the decedents were killed when their vehicle plunged into the river, and a wrongful death action was brought against Illinois in the Iowa state court. Illinois' limited immunity waiver statute required pre-conditions to suit, and placed a ceiling of $100,000 on the state's liability. The Iowa Court, in rejecting Illinois' contention that such limitations on its waiver of immunity must be recognized, stated: [at 322 N.W.2d p. 86]

> "Illinois seeks to distinguish the present case from *Hall* by pointing out that its duty to maintain the Interstate 80 Bridge arose from a contract that it entered in its sovereign capacity in a spirit of cooperative federalism. It asserts that footnote 24 in *Hall* limits the holding to its unique facts, leaving intact an allegedly pre-existing constitutional bar to state court jurisdiction over sister states where liability is alleged based on the sister state's exercise of a governmental function. . . .
>
> "We see several flaws in Illinois' position. First, the *Hall* case enunciates for the first time an alternative general principle that the Constitution does not man-

> date interstate comity. It demonstrates that the prior contrary assumption was unwarranted. The case does not merely carve out an exception to a general principle of immunity. Second, the footnote points out that the *Hall* facts did not threaten Nevada's sovereign prerogatives and responsibilities. It does not necessarily limit the holding to the *Hall* facts. Finally, the footnote merely reserves the question of different analysis or result where different state policies are involved. It does not suggest that an exception must be made where, as here, a threat to interstate cooperation is asserted. We do not think that allowing Illinois to be sued in Iowa courts for torts committed in Iowa constitutes a substantial threat to our constitutional system of cooperative federalism."

With regard to the contention that allowing suit would threaten the interstate contractual relationship entered into in the spirit of "cooperative federalism", the Iowa Court, in *Struebin v. State, supra,* echoed the sentiments of the District of Columbia Court expressed in the quoted portion of *Daughtry v. Arlington County, Virginia, supra,* when it stated:

> "Illinois does not and could not claim a sovereign right to be negligent in carrying out its contractual responsibilities in maintaining the Interstate 80 Bridge. The fact that it accepted the responsibilities as a sovereign does not make them any less obligatory."

In concluding its opinion, the Iowa Court cited with approval the decisions of the other state courts which have construed the *Hall* decision, noting that all of the courts which have been called upon to construe that decision have been uniform in their application thereof to open the courts of the forum state to permit its citizens to seek relief against a

sister state under circumstances wherein the forum state would be subject to suit under its own policy, regardless of whether the duties giving rise to the claimed liability arose from contract and regardless of whether they involved the exercise of governmental functions. It is respectfully submitted that the decision of the Nevada Supreme Court in the case at bar is well within the perameters of the decisions of the other state courts, and does not present a unique situation of compelling sister state policies such as envisioned in footnote 24 of this Court's decision in *State of Nevada v. Hall, supra.* This case involves nothing more than an application of the principles of *Hall*, and does not require the creation of an exception thereto. Nothing in the assertion of jurisdiction by Nevada over Wisconsin in the context of this case threatens Wisconsin's ability to carry out its contractual obligations entered into as a sovereign, or the spirit of cooperative federalism in which such contract was entered into. In fact, the thrust of this action is to enforce such contractual obligations, not interfere with them. It is therefore respectfully submitted that there is nothing in the constitutional system of cooperative federalism which requires review of the Nevada Supreme Court's decision in the case at bar.

B. The Full Faith and Credit Clause Does Not Require Nevada, as a Matter of Constitutional Mandate, or by Reason of Comity, to Recognize Wisconsin's Reserved Sovereign Immunity

The Petitioner's second contention is that the Full Faith and Credit Clause, Article IV, Section 1 of the United States Constitution, mandates that Nevada recognize and honor Wisconsin's reservation of sovereign immunity

against the type of liability sought to be imposed in the case at bar.

The Petitioner's argument is premised upon the contention that Nevada's exercise of jurisdiction over Wisconsin in the context of this case serves nothing more than a parochial purpose of providing Nevada residents a remedy in Nevada courts. The Petitioners point out that since Nevada itself is a party to the Interstate Compact, its own policy supports the policy and purposes of the Compact, and the retention of immunity for discretionary functions, such as the decision to permit a probationer to transfer to another State. Thus, argues Petitioners, Nevada's limited interest in providing a forum to its own residents is insufficient to defeat or override Wisconsin's legitimate policy interest in fulfilling its sovereign responsibilities with regard to the administration of its criminal justice system.

It is respectfully submitted that in structuring this argument, the Petitioners have painted with too broad a brush. Nothing in this litigation threatens the performance of any State under the Interstate Compact, or implies any purpose to defeat the policies and purposes of the Interstate Compact. On the contrary, recognition of the liability sought to be imposed on Wisconsin in this case by the Nevada courts will enhance performance and further the policies and purposes of the Interstate Compact as both the Nevada Trial Court, Respondent herein, and the Nevada Supreme Court noted in their respective opinions. Enforcement of a cause of action arising for damages for negligent performance of contractually assumed responsibilities will not sound the death knell of the Interstate Compact anymore than the imposition of strict products liability sounded the

death knell of the manufacturing and distributing industries in the United States. It is not the utilization of the Compact provisions which will give rise to liability; it is the negligence in the carrying out of the duties and responsibilities which is the foundation of the remedy provided in the courts of the receiving state.

A review of what is actually at issue in this case immediately exposes the fallacy of the Petitioner's argument. Both the Respondent Trial Court and the Nevada Supreme Court were very careful to point out that this case does not involve a challenge to the Interstate Compact itself, or an attempt to subvert its policies and purposes. Nor does this case involve an attempt to impose liability for a decision to effect a transfer under the Compact. This case simply involves asserted liability for negligence on the part of the Petitioners in failing to comply with the provisions of the act regarding arrangements for supervision and control of a transferred probationer, and negligence in failing to warn and advise the persons in the receiving state of known propensities of the transferred person to commit acts of sexual assault on young male children, when the home to which the person was to be sent had therein young male children. Both the Respondent Trial Court and the Nevada Supreme Court quoted from The Council of State Government, Handbook for Interstate Crime Control, The Interstate Compact for Supervision of Parolees and Probationers, page 1 (1978 ed.) as follows:

> "The prime purpose of both probation and parole is the protection of the community through the rehabilitation of those convicted of crime (and) the success of both procedures depends on adequate control of those who are released and intelligent supervision while under care."

Thus, the imposition of liability for failure to use reasonable care to provide such adequate control and intelligent supervision will enhance rather than defeat the purposes and policies of the Interstate Compact. The gravamen of the Complaint against the Petitioners is their negligent failure to comply with the mandate of the Compact that the consent of the receiving state be first obtained before transfer is authorized, and after the receiving state has been given an opportunity to conduct an appropriate investigation, and the obtaining of the agreement of the receiving state to provide such supervision and control upon the arrival of the transferred person. Nevada has previously announced its policy that those governmental agencies and instrumentalities charged with the responsibility of providing supervision and control over persons involved in the criminal corrections system will be liable to private citizens who sustain injuries as a result of the negligent performance of such duties of supervision and control (*State v. Silva,* 86 Nev. 911, 478 P.2d 591 (1970)). It is well within the legitimate policy interests of Nevada to provide a similar remedy to its citizens when they suffer similar injuries from negligent supervision and control within the State of Nevada by employees of sister states charged with such duties. The duties of supervision and control had not been transferred to Nevada pursuant to the Interstate Compact insofar as this case is concerned, since Nevada had not consented to such transfer and agreed to assume such duties. Thus Barney Blake was still subject to supervision and control of Wisconsin, and its negligent performance of such duties is the basis of the action herein involved. It is not a mere parochial interest, but is the same type of interest involved in *State of Nevada v. Hall, supra,* wherein

California had waived its immunity from liability for injuries it negligently caused, and was held entitled to apply that policy to injuries negligently caused within its border by a sister state who had not waived such immunity.

In fact, in the case at bar, the conflict of policy between the two states is not nearly so clear-cut. Wisconsin has judicially abolished the substantive defense of sovereign immunity, and thus, even under its own law, would be substantively liable for the claim herein asserted. (*Holytz v. Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962)) However, it has retained the power to deny access to its courts by the withholding of consent to be sued, thereby creating a procedural immunity to liability when its withholds such consent. (*Townsend v. Wisconsin Desert Horse Association et al.*, 72 Wis.2d 414, 167 N.W.2d 425 (1969); *Knox v. Regents of University of Wisconsin*, 395 F.Supp. 886 (E.D.Wis. 1975). Thus the only type of immunity retained as the policy of the State of Wisconsin is a "forum-access" type of immunity; the policy of the State of Wisconsin is that it is not substantively immune from liability for its torts. Whatever may be the right of Wisconsin to deny access to its own courts, or to retain the right to require its consent as a condition to being sued in the federal courts pursuant to the Eleventh Amendment, *State of Nevada v. Hall, supra,* makes it very clear that the Full Faith and Credit Clause does not permit it to extend such procedural power into the courts of sister states. This Court therein stated:

> "This explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a

> second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity."

The State of Nevada has declared its will in the decision attached to the Petition as Appendix B that the citizens of this state will have a remedy for injuries they sustain as the result of negligent failure to discharge the duties and responsibilities of supervision and control over persons in actual or constructive custody in the criminal corrections system, regardless of whether the persons guilty of such negligence are employees of the State of Nevada or some other state. Nothing in the Full Faith and Credit Clause requires Nevada to frustrate that policy in favor of Wisconsin's procedural immunity which permits it to deny access to its own courts for a remedy for that type of liability. That procedural immunity does not extend to the Courts of the State of Nevada, and Nevada is not constitutionally required by the Full Faith and Credit Clause to deny its citizens access to its courts to enforce a claim recognized as valid against the sovereign in Nevada.

It is therefore respectfully submitted that the Full Faith and Credit Clause does not require Nevada to subjugate its legitimate policy interest in allowing recovery for damages sustained by private citizens as a result of governmental negligence in the supervision and control of persons in custody to the limited interest of Wisconsin in withholding its consent to be sued as a procedural bar to liability for which substantive immunity has been waived. (*Cf. Allstate Insurance v. Hague,* 449 U.S. 302, 66 L.Ed.2d 521, 101 S.Ct. 633 (1981), footnote 9, p. 322-323.)

CONCLUSION

There being no issues involved in this litigation which require any limitation upon the prior decision of this Court in *State of Nevada v. Hall, supra,* it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

FRANK R. PETERSEN
STEVEN F. PETERSEN*
Petersen & Petersen
Attorneys for Respondents

**Counsel of Record*

(Appendices follow)

Appendix A

In the Supreme Court of the State of Nevada

No. 14180

B. Mianecki, and the State of Wisconsin,
Petitioners,

vs.

Second Judicial District Court of the State of Nevada,
in and for the County of Washoe, and the Honorable
John E. Gabrielli,
Respondent.
Linda A. Averett and Stanley E. Averett, individually;
and Linda C. Averett, as mother and guardian of
Trent Averett, a minor child,
Real Parties in Interest.

[Filed November 9, 1982]

ORDER

Petitioners have moved to file a brief in reply to the points and authorities filed by respondent. Specifically, petitioners request permission to respond to "new cases" which have been cited by respondent. Petitioners have also moved for permission to file affidavits from various administrators of the interstate compact at issue in this case. Respondent opposes both requests.

Cause appearing, we grant the request to file a brief in reply to new cases raised by respondent. The brief shall be filed with the clerk not later than Friday, November 12, 1982.

With respect to the filing of additional affidavits, we note that this proceeding challenges the district court's order denying petitioners' motion to quash, and that affidavits were neither filed with nor considered by the district court in its ruling on the motion. Accordingly, we deny the request to file additional affidavits in support of the petition.

It is so ORDERED.

/s/ Gunderson, C. J.

Appendix B

In the Supreme Court of the State of Nevada

No. 14180

B. Mianecki, and the State of Wisconsin,
Petitioners,
vs.
Second Judicial District Court of the State of Nevada,
in and for the County of Washoe, and
the Honorable John E. Gabrielli,
Respondent.
Linda A. Averett and Stanley E. Averett, individually;
and Linda C. Averett, as mother and guardian of
Trent Averett, a minor child,
Real Parties in Interest.

[Filed December 8, 1982]

ORDER

Cause appearing, we hereby deny petitioners' "Motion for Reconsideration and Request to File Amicus Curiae Brief."

It is so ORDERED.

/s/ Gunderson, C. J.
/s/ Menoukian, J.
/s/ Steffen, J.

cc: Messrs. Woodburn, Wedge, Blakey and Jeppson
Messrs. Petersen & Petersen